STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2006
v	No. 262521 Kalkaska Circuit Court
TERRY ALLEN NEFF, Defendant-Appellant.	LC No. 03-002384-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant Terry Neff appeals as of right from his jury convictions of one count of first-degree criminal sexual conduct (CSC I),[1] one count of second-degree criminal sexual conduct (CSC II),[2] and one count of carrying a concealed weapon (CCW).[3] The trial court sentenced Neff as a second-offense habitual offender,[4] to concurrent prison terms of 30 to 60 years for the CSC I conviction, 14 to 22 1/2 years for the CSC II conviction, and 13 to 90 months for the CCW conviction. We affirm in part and reverse in part.

I. Basic Facts And Procedural History

The complainant in this case was a 19-year-old woman who was described as having the mental capacity of a 22-month-old child and who was unable to speak and had limited physical coordination. She required total, around the clock care and was entrusted to Neff to provide that care. The incident that forms the basis of the charge took place when Neff picked up the complainant from her mother and then stopped in a wooded area, placed her in the backseat of his vehicle, and sexually assaulted and allegedly penetrated her. Soon after, his vehicle was spotted by Department of Natural Resources (DNR) police officers who stopped to investigate. When they arrived, Neff was in the back of his vehicle with the complainant and he, by his own

[1] MCL 750.520b(1)(h) (victim mentally incapable).

[2] MCL 750.520c(1)(h) (victim mentally incapable).

[3] MCL 750.227(1).

[4] MCL 769.10.

later admission, told them false stories about what was going on in an attempt to get away without further inquiry. The police did not believe him, and he was arrested and charged with sexually abusing the complainant while she was under his care. A knife was also incidentally found in the center console of Neff's vehicle under some CDs, resulting in the CCW charge.

Later, when Neff was in detention while awaiting trial, he wrote two letters, one to a friend and one to the judge, in which he admitted his guilt on the CSC II charge but denied there was any penetration.

II. MRE 404(b)

A. Standard Of Review

Neff argues that the trial court abused its discretion when it allowed the introduction of evidence of his prior sexual abuse of his niece. We review for an abuse of discretion a trial court's decision whether to admit evidence.[5] But we review de novo a preliminary question of law regarding the admissibility of evidence.[6]

B. Evidence Of Prior Sexual Abuse

MRE 404(b)(1) sets forth the standards for the admission of bad acts evidence. It provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct.[7] However, the rule is one of inclusion, not exclusion, because only one use of character evidence is excluded, while several other permissible uses of such evidence are identified.[8] Evidence of character through bad acts is only to be excluded where its value as evidence is solely to show a defendant is a bad sort of person who has done, or is likely to do, a certain course of conduct based on that character.[9]

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[5] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[6] *Id.*

[7] *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998).

[8] *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994).

[9] *Id.*

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice.[10] A proper purpose is one other than showing the defendant's propensity to commit the offense.[11] The prosecutor has the burden of showing the evidence is relevant.[12] It would be unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury.[13]

> When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again."[14]

Where there are enough commonalities between two acts, they can be considered evidence that those commonalities are caused by an individual's general plan of action.[15] Such commonalities need not be distinctive or unusual, and a common scheme may be found even where there are many dissimilarities between the acts.[16] Where reasonable people could disagree on whether the similarities outweigh the differences, a trial court will not be found to have abused its discretion.[17]

(1) Relevance And Proper Purpose

There were many differences between Neff's alleged acts with his niece and his acts with the complainant. His niece was a minor, well below the age of consent. The complainant was legally an adult. His niece had the normal mental ability of a child her age and was able to understand the nature of her encounters with Neff. The complainant was mentally an infant, arguably unable to even be aware of what Neff did with her. His niece said Neff's assaults started with about a year of looking at her naked and fondling her and only later led to intercourse. In this case, the prosecution argues that Neff essentially went straight to intercourse and did not start with just looking and fondling, as Neff claimed. Although Neff was the earlier complainant's uncle, there was no evidence presented to suggest that Neff was officially in a supervisory role over her. This is contrasted with the complainant, for whom it was Neff's

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[10] *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

[11] *VanderVliet*, *supra* at 74.

[12] *Knox*, *supra* at 509.

[13] *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

[14] *Id*. (citations omitted).

[15] *People v Sabin* (*After Remand*), 463 Mich 43, 64-65; 614 NW2d 888 (2000).

[16] *Id*. at 65-67.

[17] *Id*. at 67.

official professional responsibility to care. And, while his niece stated she was assaulted in Neff's vehicle, this was not the exclusive means he used to assault her.

But one could characterize much of the above differences as similarities. The overall similarity being Neff's practice of victimizing those of low combined average mental and physical ages. Further, in both instances, Neff took advantage of the fact that he was trusted to help care for the girls. And the location and timing of his assaults on the complainant is consistent with Neff's pattern with the earlier complainant of taking every minor opportunity he had to perpetrate an assault.

Thus, while there seem to be significant differences between the prior acts and Neff's assault of the complainant, the significant similarities make this a close question. That is, reasonable people could disagree on whether the similarities outweigh the differences.[18] Accordingly, we cannot conclude that the trial court abused its discretion in finding that Neff's acts with the earlier complainant were admissible and relevant for the proper purpose of showing a common plan or scheme.

(2) Probative Value

Whether the probative value of evidence of Neff's assaults against his niece was substantially outweighed by the prejudicial effect of admitting it under MRE 403 is another close issue. The facts of this case are somewhat unusual, in that Neff has, despite his official pleading, admitted his guilt on the CSC II count. Thus, the probative value of Neff's assaults on the earlier complainant relates to the question of whether, when committing a sexual assault on the complainant, Neff penetrated her.

The trial court found that the prior acts of abuse were "very, very prejudicial," which is entirely understandable, given the heinous nature and sheer volume of the acts. Despite that, the trial court found that this high level of prejudice was not substantially more than the probative value of that evidence. Again, where it is a close issue, a trial court will not generally be found to have abused its discretion.[19] Therefore, we cannot conclude that the trial court abused its discretion when it admitted evidence of Neff's sexual assaults against the earlier complainant.

III. Sentencing

A. Standard Of Review

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."[20] "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its

[18] *Id.*

[19] *Id.*

[20] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

discretion and whether the record evidence adequately supports a particular score."[21] But we review de novo the trial court's interpretation of the meaning of the sentencing guidelines statute itself.[22]

B. Offense Variable 4

Neff argues that the trial court improperly scored ten points under the sentencing guidelines for offense variable (OV) 4. We agree.

According to the sentencing guidelines, OV 4 is scored where there is serious psychological injury to a victim.[23] "Serious psychological injury requiring professional treatment occurred to a victim" results in ten points.[24] This is so even if no treatment has been sought.[25] However, the sentencing guidelines do not provide a definition for the term "victim." The plain and ordinary understanding[26] of the "victim" of a crime, especially in the context of sexual crimes, is the person against whom the criminal perpetrator directly acted to complete the crime. There is nothing to suggest that the "victim" in this context includes those persons vicariously affected by the crime, such as family members. Indeed, OV 5 scores points specifically for psychological injury to a member of a victim's family but only in cases of homicide, attempted homicide, or assault with intent to murder.[27] This shows legislative intent to only score points for psychological injury to family members of victims for those particular, limited circumstances.

Though the prosecution provides no case law or statutory authority to support its claim, and no explanation why definitions from an act unrelated to sentencing would be controlling on the sentencing guidelines, it claims that the definition of "victim," as supplied in MCL 780.752 for the Crime Victim's Rights Act, applies to the sentencing guidelines.[28] But the sentencing guidelines clearly serve a different purpose than a statute created to give rights to crime victims. Thus, absent specific statutory language or case precedent showing otherwise, there is no reason to apply the definition of "victim" from one to the other. Therefore, we conclude that the complainant's parents do not qualify as "victims" as that term was intended in OV 4. Lowering

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[21] *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[22] *Id*.

[23] MCL 777.34(1).

[24] MCL 777.34(1)(a).

[25] MCL 777.34(2).

[26] MCL 8.3(a); *Cain v Waste Mgt, Inc* (*After Remand*), 472 Mich 236, 245; 697 NW2d 130 (2005).

[27] MCL 777.22; MCL 777.35.

[28] *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1958).

Neff's score ten points reduces his sentencing guideline range from 108 to 225 months down to 81 to 168 months.[29]

Further, we note that because Neff's sentence does not fall within the appropriate guidelines range and the trial court did not clearly indicate that it would have imposed the same sentence regardless of the scoring error, unlike the Court in *People v Mutchie*, we cannot conclude that reversal is not required.[30] It was therefore inappropriate for the trial court to score points for any psychological injury they may have suffered as a result of the complainant's assault.

C. Offense Variable 19

Neff argues that the trial court erroneously scored ten points under OV 19 for the lies he told to the police at the time of the incident in an effort to avoid investigation and arrest. We disagree. OV 19 of the sentencing guidelines calls for scoring ten points where the "offender otherwise interfered with or attempted to interfere with the administration of justice."[31] "The investigation of a crime is critical to the administration of justice."[32] Providing false information to the police when they are investigating whether an offense has been committed constitutes an interference with the administration of justice.[33] In this case, Neff lied to the police about what he was doing and why the complainant was in the back seat of his vehicle in order to get them to let him go quickly. This was more than just mere denial of criminal activity, but rather was actively lying in an attempt to prevent further police investigation. It was therefore appropriate for the trial court to score Neff ten points for his attempted interference with the administration of justice.

D. Departure From Guidelines

Neff argues that the trial court abused its discretion when it imposed a sentence outside of the sentencing guidelines. We disagree. We review for an abuse of discretion a trial court's determination that there is a substantial and compelling reason to support a departure from the sentencing guidelines.[34] There is no abuse of discretion if the sentence is within the range of reasonable and principled outcomes.[35] However, if a sentence departs from the guidelines without a substantial and compelling reason to do so, this Court must remand for resentencing.[36]

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[29] MCL 777.62; MCL 769.10.

[30] *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006); *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

[31] MCL 777.49(d).

[32] *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004).

[33] See *id*. at 288.

[34] *People v Babcock*, 469 Mich 247, 265-266; 666 NW2d 231 (2003).

[35] *Id.* at 269-270.

[36] *Id*. at 265; MCL 769.34(11).

"[T]he reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence."[37] A factor already part of the sentencing guidelines calculations can be used as a basis for departing from the guidelines if the trial court finds that the factor has been given inadequate or disproportionate weight.[38] If the trial court departs from the guidelines and "its sentence is not proportionate to the seriousness of defendant's conduct and his criminal history" the case must be remanded to the trial court for resentencing.[39]

The trial court explained its reasons for exceeding the guidelines at the sentencing hearing as follows:

> You did violate an important trust that the parents placed in you. I really don't think that is scored or properly considered in the guidelines. Although I do typically follow the guidelines 99 percent of the time, I am just so incapable of understanding the mental processes that you went through to engage in sexual conduct with a mentally handicapped girl. That's just beyond understanding.
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> And though there is consideration in the guidelines for the type of victim involved here, I don't think it ever was envisioned that somebody would take advantage of a mentally handicapped 19-year-old girl of infantile mentality. Particularly where you are the caregiver and trusted guardian. It just goes – it's just beyond understanding. I read your description or version of the offense and it still is beyond understanding even after reading that.
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> And so you do have a history of molesting young girls as evidenced by the testimony of the witnesses at the trial, so I don't think the guidelines as to CSC One adequately score that and I will have to depart from the guidelines in your case for those reasons, those two main reasons that I've outlined here. We do need to protect mentally handicapped girls in that they are a part of society just as much as anyone else, and society needs to be protected.

We conclude that the trial court did not abuse its discretion in finding that there were substantial and compelling reasons for a substantial upward departure from the sentencing guidelines with regard to Neff's sentences. The prosecution presented evidence that Neff committed over 50 prior uncharged felonies, i.e., the sexual assaults on his niece. Thus, we conclude that the trial court did not abuse its discretion in concluding that these numerous uncharged felonies served as a substantial and compelling reason to depart from the sentencing guidelines. Further, Neff's violation of trust in abusing a helpless, mentally handicapped young woman under his totally dependent, professional care, is also a valid reason for departure from the guidelines, as it certainly "keenly" and "irresistibly" grabs one's attention as particularly

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[37] *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).

[38] *Babcock, supra* at 272.

[39] *Id*. at 273.

disgusting and egregious conduct,[40] that goes far beyond the bare requirements of the elements of the offense.

We affirm Neff's convictions, but we reverse and remand for resentencing in light of the trial court's erroneous scoring of OV 4. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

[40] *Fields, supra* at 67.